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OCTOBER TERM, 1897.

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THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY AND E. P. HILL AND N. N. SHAW, PLAINTIFFS IN ERROR,

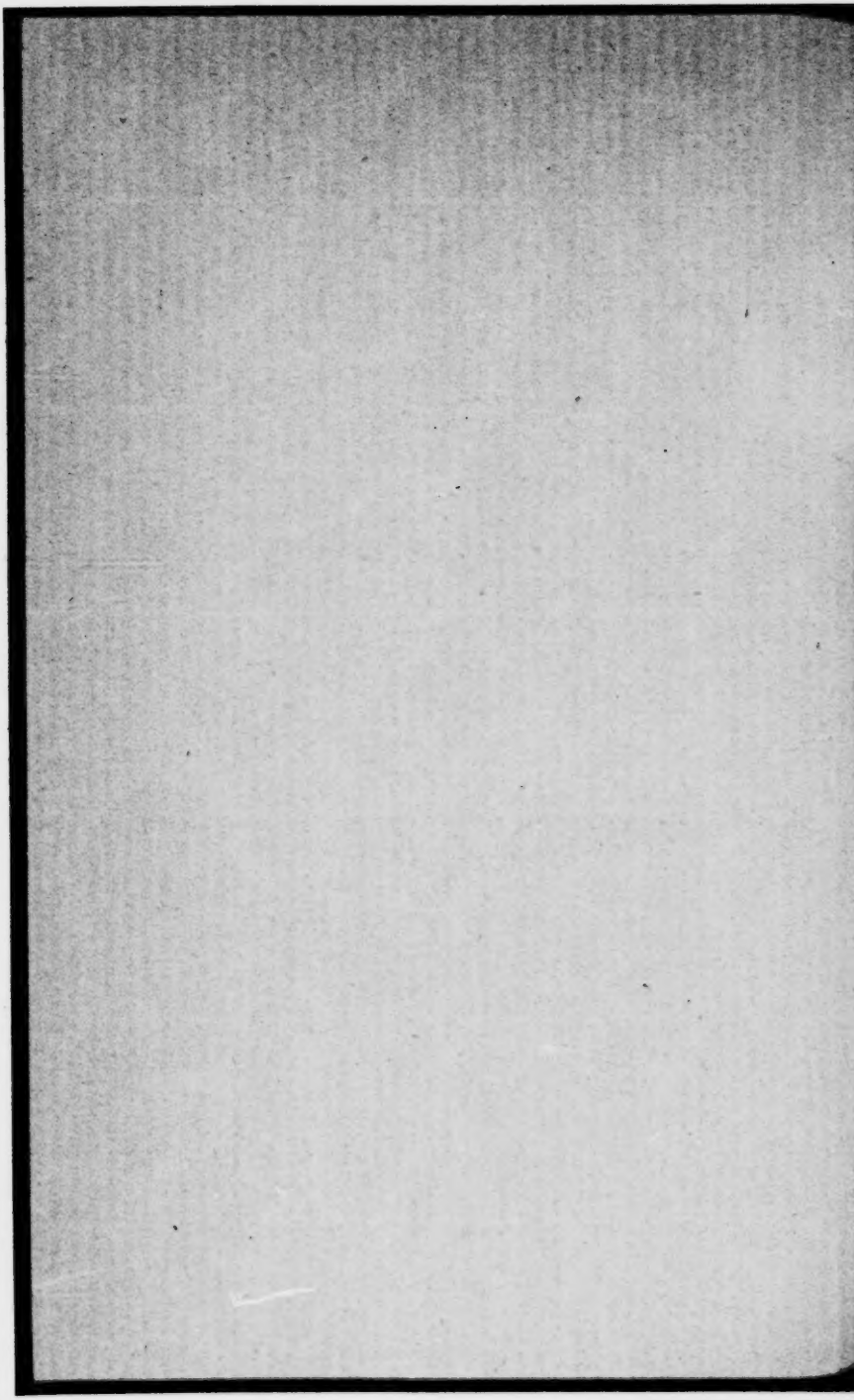
vs.

THE STATE OF TEXAS.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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IN THE

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vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I.

The statement made in our opening brief that the State supreme court practically concedes the general proposition that legislative authority to a railroad corporation having an existing land grant to change its route would carry with it the right to a land grant for the road constructed along the changed route is of prime importance, and we desire to submit some additional observations upon that point.

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The words of the supreme court are:

"It may be conceded that, so long as the general law which granted the privileges of acquiring lands remained in force, and so long as no constitutional inhibition stood in the way, legislative authority to a company to change the line to be constructed should be construed to carry with it the privilege of earning lands for the construction of the new line." (R., p. 115.)

Transforming this clause from a general to a particular statement, we have the following declaration of the court: If it were not for the inhibition in section 6 of article 10 of the Constitution of 1869, the special act of July 27, 1870, authorizing the plaintiff in error to change its line from a route via Austin to one via San Antonio, would carry with it the privilege of earning lands for the construction of the road between Columbus and San Antonio.

Stated more briefly and in another form, the State court concedes that, if the special act authorizing the change of route had been adopted in 1868 instead of in 1870, the plaintiff in error would have been entitled to a land grant for its line constructed along the changed route. Why? Because its existing land grant was of such a nature that it was not destroyed by a change of route, but attached to the new route.

We submit, therefore, that we have the authority of the State supreme court, or at least its concession in support of the proposition, that a railroad corporation entitled to the land grant offered in the general act of January 30, 1854, although its road is restricted to a certain route, has, nevertheless, a right of such a nature that when the restriction as to route is removed by subsequent legislation and a new

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route authorized, its right to a land grant accompanies and extends to the changed route. Now, the Buffalo Bayou, Brazos and Colorado Railroad Company was such a corporation and had such a right to a land grant, which right passed unimpaired to the plaintiff in error through the purchasers of the sold-out company. This right antedated the constitution of 1869. To construe that constitution as interfering with this right, as curtailing its scope and operation so as to prevent it from extending, *ex proprio vigore*, to the changed route, is to render the constitution amenable to the objection of impairing and abridging the right in question.

In our first brief we combatted the contention that when a previously existing corporation is authorized by an act of the legislature to change its route it can enjoy with reference to the altered route only such rights and franchises as could be conferred by the legislature which authorized the variation in route. We referred to that contention as the theory upon which the State court reached its conclusion. The reference is not strictly accurate. The theory of the decision of the State court has been stated above, and it is that although the land grant of plaintiff in error existing prior to 1870 was of such a nature that it would not be destroyed by a change of route, but would attach to the new route, yet that the effect of the prohibition in the constitution of 1869 was to change the nature of our existing land-grant rights, to attach them indissolubly to whatever was the then designated route of the road, and to deprive them of the capacity to accompany a change of route. As a land grant which will accompany a change of route is more valuable than a land grant which will be lost by a change of route, the constitution of 1869, as construed

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by the State court, has impaired and abridged our land-grant rights within the prohibition of the Federal Constitution.

II.

We desire to state more fully the nature of the Federal question involved in the second branch of the defense discussed under heading II of our original brief. Before we can urge as an equitable defense to this suit our rights and claims growing out of the construction of the portion of the railroad between San Antonio and El Paso, we must show their existence and the unlawful repudiation thereof by the State. Whether or not they exist and whether or not they have been unconstitutionally repudiated depend upon the correctness of the charge we make that the repealing act of April 22, 1882, is violative of the Federal Constitution, in that it impairs the obligation of the contract growing out of the State's offer of aid in the line, the railroad company's acceptance thereof, and the construction of its road in reliance thereon.

We accordingly asked the State court to hold that our right to a land grant for the construction of the portion of the road in question was a contract and a vested right within the protection of the Federal Constitution; that the repealing act of 1882 impaired the same within the prohibition of that Constitution, and that the act of 1882 was accordingly null and void.

The State court not only failed to so hold, but, as we construe the opinion, it rested its decision against us on this branch of the case upon the existence of a condition of things for which the act of 1882 was solely responsible, thus

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giving effect to that law. To decide a case against a litigant by reason of a state of facts or a condition of things created or brought about by a law which he charges to be unconstitutional is tantamount to giving effect to that law; and so, to decide a case against him for failure to do something that he is prevented from doing by a law which, for that reason, he claims to be contrary to the Federal Constitution, is also equivalent to deciding the Federal question against him.

The decision of the State court on this branch of the case is found in the brief answer of the State supreme court to question 3 of the certified questions (R. p. 117). In certifying this question the court of appeals stated that the State had refused to issue land certificates for the road constructed westward from San Antonio, the governor refusing the application for inspection on the ground that the laws granting certificates had been repealed. (R., p. 110; see also Conclusions of Fact, R. p. 125, where the correct mileage of the road between San Antonio and El Paso is stated to be 623.14 miles.)

The answer of the State supreme court to question 3 is as follows:

"Referring to the third question certified by the court of civil appeals, we are of the opinion that it is no defense to an action of the State for the recovery of the lands involved in this suit that the company may have been entitled to certificates for the 163 miles of additional road constructed under the law of 1876. It acquired no title, either legal or equitable, to the lands in controversy by causing them to be surveyed and patented under the certificates granted for the San Antonio extension. To make its rights to lands earned by the additional construction effectual for any purpose it must have procured its certificates and located them upon some por-

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tion of the public domain not reserved from the location of such certificates. Our complicated and ever-varying laws in regard to the appropriation of the public domain have probably given rise to more questions affecting the location of lands than have ever arisen in any other jurisdiction, and yet we know of no case in this court in which it has ever been ruled that the claimant of land against the State under a location made by virtue of a void certificate has any equity in the premises by reason of being the possessor of another valid certificate."

A careful consideration of the foregoing extract from the opinion of the supreme court, which was adopted by the court of appeals, will show that the State court rejected the equitable defense based on plaintiff in error's rights under the act of 1876, because, to use its own words, "to make its right to lands effectual for any purpose it must have procured its certificates and located them upon some portion of the public domain not reserved from the location of such certificates."

The decision quoted above contains four sentences. The first sentence is a mere categorical answer to question 3, and does not give the grounds upon which the question is answered. The second sentence simply states a fact, that no certificates for land earned by the San Antonio extension had been issued or located or surveyed. The third sentence states the real ground of the decision as follows:

"To make its right to land earned by the additional construction effectual for any purpose, it must have procured its certificates and located them upon some portion of the public domain not reserved from the location of such certificates."

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It is true that in the fourth and last sentence the court comments upon the novelty of the equitable defense; but, as it had already decided that without the issuance of land certificates our rights arising from the construction of the San Antonio extension could not be effectual for any purpose, it was unnecessary for it to find any other ground for its decision. While the observation upon the novelty of the contention advanced by plaintiff in error may imply a disinclination on the part of the State court to assent to its correctness, it is far from being equivalent to deciding the case on a ground independent of the Federal question, so as to deprive this court of jurisdiction to review this branch of the case.

We submit that the State court gave affect to the repealing act of April 22, 1882, when it decided the second branch of the defense against plaintiff in error upon a condition of things for which that law was solely responsible, *i. e.*, the failure of plaintiff in error to secure land certificates to evidence its title to lands earned by the construction of the San Antonio extension, and to cause the same to be surveyed and located.

The object of this supplemental argument is to point out more clearly the nature of the Federal question. Our answer to the effect given to the failure to obtain land certificates will be found on pages 145 ffg. of the first brief.

Respectfully submitted.

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